No. 288.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FARMERS' LOAN & TRUST COMPANY, *Appellant*,

vs.

PETER G. LONGWORTH, MICHAEL RASKEY AND ANNIE RASKEY, HIS WIFE, AND RICHARD A. BELLINGER, *Appellees.*

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

PETITION FOR REHEARING.

JOHN B. ALLEN AND
E. C. HUGHES,
Counsel for Appellant.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors and of Counsel.

OWMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE

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PETITION FOR REHEARING.

To the Honorable Judges of said Court:

Now comes the Farmers' Loan & Trust Company, the appellant in the above entitled cause, and respectfully shows to your Honors as follows:

On the 19th day of October, 1896, this court filed its opinion in the above entitled cause, wherein it held that the motion of appellees to dismiss this appeal should be sustained, the *sole* ground therefor given in the opinion of this court being that the Northern Pacific Railroad

Company was a party to the final order made in the Circuit Court on the 18th of December, 1895, and interested therein, and that said company did not join in the appeal, and was not served with the citation and has not entered in this court its appearance and consent to said appeal. The appellant respectfully petitions this court to vacate the order of dismissal of the appeal, to grant a re-hearing of said motion to dismiss, and to reinstate and restore to the docket said cause for hearing and determination upon its merits. This petition is based upon the following grounds:

I.

The Northern Pacific Railroad Company did in fact enter its appearance in this appellate court and consent to this appeal. Its appearance was filed in this court on the 21st day of May, 1896, and is in the following language:

"IN THE UNITED STATES CIRCUIT COURT
"OF APPEALS FOR THE NINTH CIRCUIT.

"THE FARMERS' LOAN AND TRUST COMPANY, *Appellant*, vs. "PETER G. LONGWORTH, MICHAEL RASKEY and ANNIE RASKEY, his wife, "and RICHARD A. BELLINGER, *Appellees.*	No. 288. Appearance

"Comes now the Northern Pacific Railroad Company, "defendant, by E. M. Carr and Harold Preston, its

"counsel, and hereby appears in the above entitled ap-
"peal in the above named court, and consents to the
"appeal of said matter by The Farmers' Loan and
"Trust Company as above made and contained.

"E. M. CARR AND HAROLD PRESTON.
"*Attorney for said Defendant.*"

This court in its opinion notices the fact of the appearance of Andrew F. Burleigh, the Receiver, but overlooks the appearance of the Railroad Company. This is doubtless due to the fact that the same mistake was made in the brief of appellees in support of their motion to dismiss. This motion and brief were made and filed too late for appellant to file an answering brief and the statement contained in the brief of appellees in support of their motion must have been taken by the court to be true. Being thus misled in respect to what this court appears to have deemed an essential fact, we believe it will make haste to correct this inadvertence by granting a re-hearing and restoring the case to the docket.

II.

It is also stated as a fact in the opinion of this court in this case that "after the appeal was perfected in this ,, court, and after a motion had been filed by the "appellees to dismiss the same, the receiver, by his "attorney, entered in this court his appearance and "consent to the appeal." We think that the entry of appearance and consent by said receiver was filed in this court on the 21st day of May, 1896, and that the entry of appearance and consent by the Northern Pacific Railroad Company, by its attorneys, Messrs. Carr &

Preston, above referred to, was filed in this court ON THE SAME DAY. The brief of the appellant was also filed the same day. The motion of the appellees to dismiss this appeal was served on the appellant on the 5th day of June, 1896, more than two weeks after the entry of appearance and consent to the appeal by said receiver, and the Northern Pacific Railroad Company. We think that by reference to the original papers on file in this court the foregoing statement of facts will be found accurate. All of these steps were taken before the expiration of the statutory time of six months allowed for appeal. It is easy to see how this court was led into a misconception of the facts, when the appellees in their motion to dismiss the appeal (See Appellees' Brief, pp. 2 and 3) which was filed after Appellant's Brief and said appearance and consent of said Receiver and said Northern Pacific Railroad Company were filed, stated that "Andrew F. Burleigh, Receiver, "and the Northern Pacific Railroad Company * * * "have not joined in this appeal or severed from it by "summons and severance, or have had any notice what-"ever by citation or otherwise, of the appeal herein," when in point of fact at the time of this motion the voluntary appearance and consent of these parties were on file in this court.

We earnestly contend that the voluntary appearance and consent to appeal by the Receiver and said Northern Pacific Railroad Company as above stated, were sufficient to confer jurisdiction upon this court to entertain this appeal.

In the case of *Buckingham v. McLean*, decided by the

Supreme Court of the United States, reported in 13th Howard *151, the court say:

"The object of a citation on a writ of error or "an appeal is to give notice of the removal of the "cause, and such notice may be waived by entering a "general appearance by counsel. Where an appear- "ance is entered, the objection that notice has not been "given is a mere technicality, and the party availing "himself of it should, at the first term he appears, give "notice of the motion to dismiss, and that his appear- "ance is entered for that purpose."

In this case no special appearance whatever was entered.

In the case of *Bigler v. Waller*, decided by the Supreme Court of the United States, reported in 12th Wallace, pp. 142, 147, the court say:

"Undoubtedly the citation is irregular, as it should "be addressed to the actual parties to the suit at the "time the appeal was allowed and prosecuted. Where "a party dies before the appeal is allowed and prose- "cuted, the suit should be revived in the subordinate "court, and the citation, as matter of course, should be "addressed to the proper party in the record at that "time. Notice is required by law, and where none is "given and the failure to comply with the requirement "is not waived, the appeal or writ of error must be dis- "missed, but the defect may be waived in various ways, "*as by consent or appearance* or the fraud of the other "party."

In the case of *Dayton v. Lash, 94 U. S., p. 112*, the court say:

"We cannot proceed to hear and determine the cause "until the parties are here, either constructively by "service *or in fact by their appearance.*"

The case of *Pierce v. Cox*, *9 Wallace*, *p. 786*, was a case of two motions to dismiss an appeal from the Supreme Court of the District of Columbia; one of the motions being made by the appellant on the ground that no citation had been issued according to law, and the other by the appellee because the amount in controversy was not of sufficient value, and because there was no evidence in the record of an allowance of the appeal. Chief Justice Chase, in delivering the opinion of the court, said:

"The motion on the part of the appellant to dismiss "the appeal, on the ground that no citation was issued "according to law, cannot be sustained. The appellee "is in court represented by counsel, and makes no ob- "jection to the want of citation. By this appearance "the citation is waived so far as the appellee is con- "cerned, and the appellant cannot be heard to object to "the want of citation occasioned by her own negligence, "and cured by voluntary appearance. But the motion "of the appellee must be granted on both the grounds "presented."

We propose to present in another part of this petition additional argument to show that by the filing of this voluntary appearance by the Northern Pacific Railroad Company the court acquired jurisdiction of all the parties necessary to the appeal, and that the Northern Pacific Railroad Company is concluded by any judgment that may be rendered by this court upon this appeal.

III.

We do not dispute the legal propositions laid down by the court in its opinion. We simply contend that they are not applicable to this case for the reason that the court misapprehended the facts.

Assuming for the present that the Railroad Company was a necessary party to this appeal, the only question to be here considered is whether it is before this court so as to be bound thereby. It did not join in the petition for the allowance of the appeal; it was not brought before the court below upon the petition for the allowance of the appeal by summons, nor was there any order of severance made; it was not served with the original citation on appeal. It has, however, entered its appearance and consent to this appeal in this court. By so doing, it has manifestly bound itself by whatever judgment shall be entered here and has estopped itself from taking any other or further appeals from the judgment or order of the court below. The fact that one of the parties jointly bound by a decree would not be so concluded by the appeal has been the essential reason always given by the Supreme Court for sustaining a motion to dismiss an appeal to which such party was not joined and by which it would not be bound. In the leading case of *Masterson v. Herndon*, *10 Wallace*, *416*, quoted by this court, and cited in all the cases decided by the Supreme Court in which this question was involved, it was said by Justice Miller: "In chancery "cases, all the parties against whom a joint decree is "rendered must join in the appeal, or they will be dis- "missed. There are two reasons for this: 1. That the "successful party may be at liberty to proceed in the

"enforcement of his judgment or decree against the par-
"ties who do not desire to have it reviewed. 2. That
"the appellate tribunal shall not be required to decide a
"second or third time the same question on the same
"record. * * * We do not attach importance to the
"technical mode of proceeding called summons and
"severance."

In respect to the first of these reasons, it may be said that the order was one which could not have been enforced against the Railroad Company. Moreover, the order was stayed by the supersedeas bond given by appellant.

As to the second of the reasons above assigned, it is patent that the Railroad Company having entered in this court its appearance and consent to the appeal would be estopped from taking any further appeal to this court from the order of the Circuit Court.

It would certainly work as complete an estoppel as would mere notice to it of appellant's intention to take this appeal, or the proceedings by summons and severance, which appear by the opinions of the court to be deemed sufficient. Upon this question of estoppel, Justice Miller says in the above cause: "The latter
"point is one to which this court has always attached
"much importance."

In the statement of the case of *Sipperley v. Smith, 155 U. S., 86*, cited in the opinion of this court in this case, it is said: "No application for summons and severance
"as to M. J. Gray or any equivalent therefor appeared
"in the record, nor any order permitting severance; nor
"was any application made in this court for the issue of

"citation to A. F. Sipperley and H. S. Lee, or leave to "perfect the appeal as to them; *nor did they or Gray* "*appear herein.*"

Upon this state of facts, the court granted the motion to dismiss in that case. In this case, however, the Railroad Company is before this court and by its own action is bound by the appeal. The Supreme Court of the United States appears to have gone much further in the case of *Inland & Seaboard Coasting Co. v. Tolson, 136 U. S., 572.*

IV.

The Northern Pacific Railroad Company was not bound by the order from which this appeal was taken and was therefore not a necessary party to this appeal.

The attention of this court was evidently not called to the state of the record in this case in the above particular. This was not due to the fault or omission of court or counsel, but rather of the rule which gives no opportunity for the filing of reply briefs. An examination of the transcript and printed record in this case will disclose the following facts: An order was made in this cause, properly entitled and numbered, bearing date August 16, 1894, directing the receivers then duly appointed and acting in said court to pay to Peter G. Longworth, Richard A. Bellinger and Michael Raskey the amounts of certain alleged judgments in their favor, or deposit with the clerk of the Circuit Court certificates for said amounts. This order was made *ex parte.* (Printed Record, p. 5.)

The only pleadings and proceedings upon which this order appears to have been based were the following: First, a notice in the following language:

"IN THE UNITED STATES CIRCUIT COURT,

"NORTHERN DIVISION.

"IN THE MATTER OF THE RECEIVERSHIP
"OF THE SEATTLE LAKE SHORE RAIL-
"ROAD COMPANY AND
"PETER G. LONGWORTH, ET AL.,
Petitioners,

VS.

"THE NORTHERN PACIFIC RAILROAD COM-
"PANY ET AL., *Defendants.*

"NOTICE.

"To the Defendants, the Seattle, Lake Shore and "Eastern Railroad Company, the Northern Pacific "Railroad Company, Henry Ives, Henry Rouse and "H. C. Payne, Receivers, and to Andrew F. Burleigh, "their attorney:

"You and each of you will please take notice that the "petitions in the above named causes, will be called up "for hearing and determination before the Hon. C. H. "Hanford, Judge of the above entitled court, at his "courtroom in the Colman Block, Seattle, King County, "at the hour of ten o'clock A. M. of the 10th day of "August, or as soon thereafter as counsel can be heard.

"JAMES HAMILTON LEWIS,
"*Attorney for Petitioners.*"

Second. A petition, entitled:

"IN THE UNITED STATES CIRCUIT COURT,
"NORTHERN DIVISION, HOLDING COURT AT SEATTLE.

"PETER G. LONGWORTH, RICHARD A. BELLINGER and MICHAEL RASKEY,
Petitioners,
vs.
"THE NORTHERN PACIFIC RAILROAD COMPANY, HENRY IVES, HENRY ROUSE and H. C. PAYNE, Receivers, *Respondents*.

This petition sets forth that the petitioners had theretofore obtained separate judgments against the Northern Pacific Railroad Company. It implies without so stating that a receiver had been appointed for that company and without indicating by what court such receiver was appointed, or in what proceeding. It alleges that the reports of the company and the said receivers show that there is a balance of the earnings in excess of a sum sufficient to defray all expenses of the operation of the road, and it prays that the receivers audit and pay these judgments, and that in default petitioners be permitted to issue execution against the property of the Northern Pacific Railroad Company. (Printed Record, pages 2-5.)

Third. An admission of service of notice signed by A. F. Burleigh as attorney for "*the Seattle, Lake Shore & Eastern Railway Company*," an entirely independent company and having an entirely distinct receivership in no wise connected with the appeal now before this court or the order or judgment from which this appeal is taken, or the cause in which it is entitled.

It will be seen, therefore, that the jurisdiction of the court below was never invoked in any proceeding instituted in accordance with the practice governing either legal or equitable proceedings. There was no original action commenced, no original process served; there was no petition for leave to intervene nor any order granting such leave in any case then pending before the Circuit Court. By their petition, however, they did succeed in invoking the action of that court and obtaining from it an order directing its receiver in a proceeding then regularly pending in said court in which The Farmers' Loan and Trust Company was plaintiff and the Northern Pacific Railroad Company was defendant, being cause No. 337, to pay out of the funds then held *in custodia legis* and involved in that controversy certain judgments asserted by the petitioners; or to issue certificates redeemable in cash in six months and bearing interest at eight per cent per annum.

When this appellant, the plaintiff in said cause No. 337, learned that funds in controversy in said action and upon which it asserted a mortgage lien were about to be paid out by the receiver in said cause No. 337, in pursuance of an *ex parte* order, which said receiver would have been compelled to obey, it moved the court for time in which to show cause why the said order should not be vacated or modified. (Printed Record, p. 6.) Subsequently, and by leave of court, it intervened in the foregoing proceeding, entitled "Peter G. Longworth, "Richard A. Bellinger and Michael Raskey, Petitioners "v. Henry Ives, Henry C. Rouse and H. C. Payne, Re-"spondents." In this intervention and answer to the petition of Longworth and others, this appellant sets

forth the facts showing its priority of right to the funds in the hands of the receivers and why the order directing the receivers to pay the demands of the petitioners granted upon their *ex parte* application should be vacated. Upon this intervention and the appellant's motion, the court refused to vacate the order made in favor of the petitioners, but did modify and in some respects enlarge it. The present appeal was taken. The first order made by the court was as to this appellant *coram non judice*. But for its intervention, the money in the hands of the receiver upon which appellant's lien operated would have been paid out and its lien destroyed. When appellant came into court, however, for the preservation of its rights and invoked the action of the court, it became bound by all orders made in the premises thereafter. The order of the court upon the motion and application of appellant having been adverse to it, it was compelled for the preservation of its rights to perfect this appeal.

But the Northern Pacific Railroad Company ~~has never been~~ was not brought into this proceeding. Each order of the court below set forth in the record in this case is as to it *coram non judice*.

The court, in its opinion, has treated the nondescript proceedings of the petitioners Longworth and others as an intervention. An intervention in what? They did not entitle their proceeding as one in the cause of The Farmers' Loan and Trust Company v. Northern Pacific Railroad Company *et al.*, No. 337. That was an action in equity for the foreclosure of a mortgage in which the parties defendant had been regularly brought before the court by process of subpœna to answer the issues ten-

dered by the bill of complaint and those only; and not only was the proceeding of petitioners not entitled in that case, but no process therein, or in any other proceeding was issued or served calling upon the Northern Pacific Railroad Company, or this appellant, to answer the allegations of their petition. If their petition is to be treated as an intervention, notwithstanding it is not so denominated and no leave to intervene was ever granted, still as a distinct demand was made foreign to and inconsistent with the facts alleged and relief demanded in the bill of complaint of the appellant, proper process should have been served upon all the parties to that action before any order or decree could be entered binding any of them, or concluding their rights.

Foster's Federal Practice (2d Ed.), Sec. 202;
Beach's Modern Equity Practice, Sec. 569;
Daniell's Chancery Practice, 5th Ed., Sec. 1606–7;
11 New Jersey Equity, 29.

The receiver, on the other hand, was the mere arm of the court. Therefore, when he was ordered to take the property of the defendant Railroad Company and which was subject to the lien of this appellant, it was not his to inquire nor to resist. He had but to obey; and except for the timely discovery of this appellant, the money constituting a part of the trust in the hands of the receiver would have been erroneously and improvidently diverted from the proper objects and purposes of that trust. Before the final order was entered from which this appeal was taken and from which alone this appellant could have appealed, Andrew F. Burleigh had become the receiver of this court in the discharge of that

trust and therefore the order in question, unlike the original order, is addressed to him as the court's then existing receiver. He has likewise entered his appearance in this cause, though that would seem to have been wholly unnecessary.

The grounds upon which this court has based its decision are expressed in the following language, quoted from its opinion:

"Applying the doctrine of these decisions to the case "before the court, it is apparent that the Northern "Pacific Railroad Company was a necessary party to "this appeal. It is true, that the answer of the Farmers' "Loan & Trust Company to the intervention of the "petitioners alleges that the Northern Pacific Railroad "Company is insolvent, and that its property is inade- "quate to meet the mortgage liens; but this fact does "not alter the rule, nor dispose of the rights of the "railroad company. The judgments have been estab- "lished against the railroad company, and it could not "be heard to contest its liability upon the same; but "it had the right to be heard upon the question of "the payment of the judgments in preference to "the payment of the mortgage liens. Concerning "that controversy it is one of the real parties in "interest. By the law of Washington the judg- "ments bear interest at eight per cent. per an- "num, and the order of the court directing their pay- "ment by the receiver provided that he should either "pay the amounts due or deposit with the clerk receiv- "ers' certificates for the respective amounts, bearing "interest at eight per cent. per annum until paid. The "mortgages bear interest at five and six per cent. The

"question of the disposition of the funds in the receiv-
"ers' hands, the payment of one lien or class of liens
"bearing one rate of interest to the exclusion or post-
"ponement of another class bearing a different rate of
"interest is one which affects the substantial right of
"the Railroad Company and upon which it is entitled
"to be heard. The motion to dismiss must be allowed."

As we have pointed out from the record, the assumption that the Northern Pacific Railway Company is a necessary party to this appeal is erroneous, not having been a party to the orders of the court below, it could not be a necessary party to this appeal.

We therefore respectfully submit that a rehearing should be granted, the motion to dismiss denied and the appeal determined upon its merits.

JOHN B. ALLEN AND
E. C. HUGHES,
Counsel for Appellant.

STRUVE, ALLEN, HUGHES & McMICKEN,
Solicitors and of Counsel.

UNITED STATES OF AMERICA, }
STATE OF WASHINGTON. } SS.

I, E. C. Hughes, one of the solicitors in the above entitled cause, do hereby certify that the foregoing petition for re-hearing is in my judgment well-founded and that it is not interposed for delay.

E. C. HUGHES.